SUPREME COURT, U. S.
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No. 552

In the

Supreme Court of The United States

October Term, 1961

ESTATE OF LEO M. GARTLAND, Deceased,
MATTHEW GARTLAND, Administrator,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner respectfully requests a rehearing and further consideration of his Petition for a Writ of Certiorari on the following grounds, to-wit:

(1) This action involves a construction of Sections 2036 and 2041 of the Internal Revenue Code of 1954 in such a manner as to make a *donated* power of appointment the same as a *retained* power of appointment. Tax law has always distinguished the two in holding that any trust created prior to March 4, 1931, was not includible in the Estate even though income was retained for life. By legislation thereafter enacted, the transfer of property into a Trust and retaining "income and enjoyment" during life made the property includible in the donor's Estate. In the instant case, (a) the Trust was created in 1929; and (b) the donor did not retain income. The decedent was given the power of appointment, the decedent was the

donee, and his power of appointment was a *donated* power. Such is taxable only to the *extent* of the exercise, the taking of income by the decedent during his life did not and should not make the corpus of the Trust includible in this Estate. *Green* v. *U. S.*, 237 F. 2d 848; *Colonial American National Bank of Roanoke* v. *U. S.*, 243 F. 2d 312; *Peoples First National Bank and Trust Company* v. *U. S.*, 241 F. 2d 420; *C. I. R.* v. *Ridgeway Estate*, 91 F. 2d 257; *Estate of Carleton* v. *C. I. R.*, 34 T.C. 988.

(2) A donated power of appointment is governed exclusively by Section 2041 of the Internal Revenue Code of 1954 and not as was done in the instant case under Section 2036 of the Internal Revenue Code of 1954. See *U. S.* v. *Turner*, 287 F. 2d 821; *Simons* v. *U. S.*, 227 F. 2d 168. Certiorari Denied 350 U.S. 949; *U. S.* v. *Hubner*, 285 F. 2d 29. In the Brief filed by Petitioner with his Petition and in the Reply Brief heretofore filed, many other cases were cited, indicating a conflict between the Courts with the Decision in the instant case.

(3) The instant case presents a clear example of judicial legislation, which has been definitely frowned upon. See *Crooks* v. *Harrelson*, 282 U.S. 55:

> "Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. . . . It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good inten-

tion, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts."

We respectfully submit that the Petition for Rehearing should be granted, and a Writ of Certiorari issued.

Respectfully submitted.

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CERTIFICATE OF COUNSEL

I, SOL GOODMAN, Counsel for the Petitioner herein, hereby certify that this Petition for Rehearing is presented in good faith and not for delay, and said Petition is restricted to the grounds set forth therein.

SOL GOODMAN